91-1386

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

JONATHAN LOWRY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

I. ***Whether due process is accorded an accused when the Court refuses to dismiss an indictment charging one with conducting a Continuing Criminal Enterprise (CCE) in violation of Title 21 U.S.C., §848, when the indictment fails to identify the five or more persons relied on by the grand jury in returning the indictment.***

II. ***Is due process violated when the Court denies the accused's Motion by which it sought to have the Court cure or correct the devastating impact of its chief witness bolstering his own credibility by testimony he had passed a lie detector test?***

III. ***Whether the accused's right of confrontation was violated by the admission of certain egregious hearsay proof that was attributed by the case-agent to a non-testifying declarant-informant.***

IV. ***Was due process rendered impossible when the government, in spite of the bar created by Rule 404(a), was allowed to question a defendant (who was also the brother of this petitioner) who was testifying in his own defense, as to whether his brother had a***

reputation as being a drug dealer?

V. *Whether due process was accommodated when the trial court refused to instruct the jurors that in order to convict on the Continuing Criminal Enterprise Charge (21 U.S.C., §848) they were required to reach an unanimous agreement on the three (3) acts constituting the "continuing series" of "felony drug" offenses that were committed by the defendant.*

VI. *Whether due process was denied when the Court refused to instruct the jurors they had to unanimously agree on the three (3) acts required for a continuing series of "felony drug" offenses where the evidence was insufficient to prove that all of those submitted to the jury were proved.*

VII. *Whether a verdict finding one guilty of CCE can be squared with constitutional and statutory requirements that jurors must agree as to the five or more persons, and as to acts making for the "continuing series" of felony drug violations required.*

VIII. *Can a verdict finding the accused guilty of a CCE charge survive constitutional scrutiny where no*

reasonable juror could have found the proof established that the petitioner, either, (A) committed the required "continuing series" of felony drug violations, and (B) did so "in concert" with five other people as mandated by Title 21 U.S.C., §848?

IX. *Where in an indictment charging Title 21 drug offenses of CCE (§848) and Conspiracy (§846), whether the Sentencing Guidelines apply cannot be determined solely on the basis of the verdict finding the accused guilty as charged, and even if the Guidelines are applicable, the determination made must conform to fundamental criteria.*

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED . .	i
TABLE OF AUTHORITIES .	9
OPINIONS BELOW . . .	2
STATEMENT OF THE GROUNDS ON WHICH JURISDICTION IS INVOKED . .	2
RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS.	3
STATEMENT OF THE CASE .	3
STATEMENT OF THE FACTS .	4
ARGUMENTS RELIED ON FOR ALLOWANCE OF WRIT .	11
ARGUMENT NO. I:	
Due process was denied when the Court refused to dismiss the indictment based on its failure to identify the five, or more, essential persons the grand jury	

relied on in returning the CCE indictment against Jonathan Lowry. . 17

ARGUMENT NO. II:

Due process is violated when a Court refuses to strike, or otherwise protect the accused from, testimony that was willfully and cleverly volunteered by an essential government witness that he had passed a lie detector test. . . . 21

ARGUMENT NO. III:

Petitioner's right of confrontation was violated by the admission of certain prejudicial hearsay that was attributed by the case-agent to a non-testifying informant-declarant. 22

ARGUMENT NO. IV:

Due process is denied where it is apparent from the context in which a particular question was asked and the specific objections taken that the intended purpose of the question was to place the accused's character in

issue. . . . 24

ARGUMENT NO. V:

Due process was denied when the trial court refused to instruct the jury that they were required to reach an unanimous agreement on the three (3) acts constituting the "continuing series" of "felony drug" offenses committed by the defendant, in order to convict on the CCE charge. . . 27

ARGUMENT NO. VI:

Where the jury is submitted more than the required felony drug offenses needed to satisfy the "continuing series" element of the "CCE" offense, the evidence must be sufficient to prove all of them. And where (as here) it cannot be reliably determined which offenses the jury may have relied on in reaching its verdict, it cannot be said that due process was accorded the accused. . . . 30

ARGUMENT NO. VII:

A verdict finding one guilty of CCE that cannot be squared with the constitutional and statutory requirement that the jurors must unanimously agree, both, as to the five (5) or more persons, and as to acts making for the "continuing series" of felony drug violations required must be deemed invalid. . 33

ARGUMENT NO. VIII:

Where no reasonable juror, after viewing the evidence in the light most favorable to the prosecution, could have found the proof established that the petitioner, either, (A) committed the required "continuing series" of felony drug violations, and (B) did so "in concert" with five other people as mandated by Title 21 U.S.C., §848, the verdict finding the accused guilty of CCE is constitutionally defective. . . 38

ARGUMENT NO. IX:

To the extent the Guidelines were applicable, the court erred in calculating due process requires that the proper sentencing range must be determined in accordance with fundamental criteria. . . . 44

CONCLUSION . . . 62

TABLE OF AUTHORITIES

	PAGE
Dowling v. United States, 110 S.Ct. 668 (1990)	52
Hamling v. United States, 418 U.S. 87, 117 (1974)	17
McCollock v. United States, 108 S. Ct. 337 (1987)	32
McKoy v. North Carolina, 494 U.S. 433 (1990) .	34
Shepard v. United States, 290 U.S. 96 (1933). .	44
United States v. Apodaca, 843 F.2d 421 (10th Cir. 1988) . . .	20
United States v. Beros, 833 F.2d 455 (3d Cir. 1987) . .	35
United States v. Chavez, 845 F.2d 219 (9th Cir. 1988) .	43
United States v. Check, 582 F.2d 668 (2d Cir. 1978) . .	44
United States v. Douglass, 818 F.2d 1317 (7th Cir. 1987) .	39

PAGE

United States v. Echeverri, 854 F.2d 638 (3d Cir. 1988) . . . 11

United States v. Echeverry, 719 F.2d 974 (9th Cir. 1983) . . . 35

United States v. Ferris, 719 F.2d 1405 (9th Cir. 1989) . . . 29

United States v. Gibbs, 813 F.2d 596 (3d Cir. 1987) . . . 45

United States v. Gomez, 407 F. Supp. 407 (E.D. Mich. 1989) . 62

United States v. Hannah, 584 F.2d 27 (3d Cir. 1978) . . 43

United States v. Head, 641 F.2d 174 (4th Cir. 1981) . 51

United States v. Jerome, 942 F.2d 1328, 1330-1331 (9th Cir. 1991) . 11

United States v. Johnson, 823 F.2d 842 (5th Cir. 1987) . 58

PAGE

United States v. Moreno, 889 F.2d 465 (6th Cir. 1990) . 45

United States v. North, 900 F.2d 131 (8th Cir. 1990) . 54

United States v. North, 910 F.2d 843 (D.C. Cir. 1990) . . . 29

United States v. Powell, 469 U.S. 67 (1984) . 51

United States v. Ricks, 776 F.2d 455 (4th Cir. 1985) . . . 20

United States v. Sperling, 560 F.2d 1050 (2d Cir. 1977) . . 42

United States v. Staggs, 881 F.2d 1527 (10 Cir. 1989) . . . 20

United States v. Townley, 942 F.2d 1324 (9th Cir. 1991) . . 13

United States v. Valasquez, 885 F.2d 1076 (3d Cir. 1989) . . 51

United States v. Watford, 894 F.2d 665 (4th Cir. 1990) . . . 59

PAGE

Watson v. Jago, 588 F.2d 330 (6th Cir. 1977) . 18

OTHER AUTHORITIES

Rule 29(C), Federal Rules of Criminal Procedure 3

Rule 31, Federal Rules of Criminal Procedure . 28

Rule 401, Federal Rules of Evidence . . 3

Rule 10.1(a) Rules of The Supreme Court . . 3

Title 18 United States Code, §2 3

Title 18 United States Code, §2113[a] and [d] [1982] 3

Title 21 United States Code, §841 3

Title 21 United States Code, §846 3

Title 21 United States Code, §848 3

Title 28 United States Code, §1254(1) . . . 2

Sixth Amendment, United States Constitution . . 3

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

To The Honorable, The Chief Justice And Associate Justices Of The Supreme Court Of The United States:

The Petitioner, Jonathan Lowry, respectfully prays that a Writ of Certiorari issue to review the

judgment of the Fourth Circuit Court of Appeals, which judgment became final on November 27, 1991 (Appendix "A") when a Petition for Rehearing En Banc (Appendix "B") was denied.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fourth Circuit is set forth at Appendix "C" in the Appendix to this Petition. The Opinion by the trial Court denying the Motion For Judgment Of Acquittal is designated Appendix "D".

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment of the U.S. Court of Appeals was entered on October 25, 1991. The Order denying a Petition for Rehearing was entered on November 27, 1991. The jurisdiction of this Court is invoked under Title 28 U.S.C.

§1254 (1).

Jurisdiction is also being invoked under favor of **Rule 10.1(a), Rules of the Supreme Court**.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS WHICH THE CASE INVOLVES:

1. Sixth Amendment, United States Constitution;
2. 18 U.S.C., §2;
3. 18 U.S.C., §2113 [a] and [d] [1982];
4. 21 U.S.C., §841;
5. 21 U.S.C., §846;
6. 21 U.S.C., §848;
7. Rule 29 (C), Federal Rules of Criminal Procedure;
6. Rule 401, Federal Rules of Evidence;

STATEMENT OF THE CASE

Jonathan Lowry was found guilty by a jury, as "charged by the Judge" on Count I, CCE (21 U.S.C., §848);

Count II, Conspiracy (id., 846); Count III, Distribution of Cocaine (id., 841); Count IV, Interstate Trafficking (18 U.S.C., §1952) and Money Laundering (id., §1956). He was sentenced under the Guidelines on Counts I and II to a life sentence. His sentences on the non-guideline counts were made concurrent with the life sentence. By this Petition, Jonathan Lowry seeks a review of all aspects of his convictions.

STATEMENT OF THE FACTS[1]

The significant evidence presented against the petitioner, Jonathan Lowry (all of which was

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[1] References to **J.A.** are to the Joint Appendix filed in the Appeals Court. **TR** refers to the Transcript and the reference **Appendix " ", p. ___**, is to the Appendix to this Petition.

literally uncorroborated), was supplied by various individuals who sought to curry the favor of the government by supplying after-the-fact information that related to events that assertedly had occurred years before. Each of these individuals had already been convicted of serious drug offenses, or a serious homicide offense, before information was actually purchased from them in exchange for various considerations. The only exception applies to Renice Locklear, the wife of the government's chief informer. She forthrightly admitted being under intense pressure (exerted by the government and her husband) to implicate Jonathan Lowry in their wrongdoings. (**J.A., 615-616.**) While Renice Locklear was not

prosecuted, she nonetheless brazenly admitted to making "six or seven" substantial purchases of drugs in Florida. These transactions, according to her, "would usually be around a couple hundred thousand dollars or more" (**J.A., 610**). Equally significant here, these drugs were delivered to her husband, Brady Locklear, who was ultimately prosecuted and convicted in all three jurisdictions of the State of North Carolina.

Brady Locklear's testimony varied as to whether or not he shared (**J.A., p. 497, 558, 561 & 564**) the drugs he obtained from Ingrid[2] with Jonathan Lowry. Most significant here Locklear

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[2] The "Ingrid" referred to here was acquitted despite Brady Locklear's testimony in United States v. Ingrid Randall. (J.A., pp. 550-552).

admitted that whatever relationship he had with Jonathan Lowry it terminated in March, 1986 (**J.A., p. 550**). On this point, he never wavered, not even slightly. (**See, e.g., 594**). Thus, his testimony that he received between fifty (50) and seventy-five kilos (75) from Ingrid that were shared with Jonathan Lowry (**J.A., p. 550**), which figure did not include all of the kilos he had gotten from Ingrid) (**J.A., pp. 550-551**), becomes even more farfetched.

Despite cogent facts to the contrary, it could not be clearer that the Court fully credited the probation officer's reliance on Brady Locklear's naked estimate that he had gotten "sixty to seventy-five kilos" from Ingrid that were shared with Lowry

(id., 504). See, J.A., p. 2028.

The other critical witness was Pedro Fominaya, a self-admitted "dope fiend" (J.A., p. 882), and a multi-kilo broker of drugs. It was Fominaya's testimony alone that placed Jonathan Lowry under the Sentencing Guidelines. Fominaya's testimony was that he had a conversation in December, 1987 with Jonathan Lowry about the purchase of drugs.

Despite Fominaya's testimony that in the wake of this asserted conversation he made the delivery to Donald Lowry and was, in fact, paid for it (J.A., pp. 719-720), Donald Lowry was acquitted. This acquittal included, as well, Fominaya's testimony that there were at least "ten" drug transactions he had with

Donald Lowry (**J.A., p. 698**).

It is equally significant that Hardy Ray Wynn and Bonita Lowry were likewise acquitted of charges made against them solely on the basis of evidence supplied by Fominaya. Fominaya not only testified he delivered drugs to Hardy Wynn on the very first occasion he saw him (**J.A., p. 648**), he also testified that when Jonathan Lowry would take delivery himself, there would always be someone with him, and that "most of the time he [i.e., Lowry] would be accompanied by Hardy Ray Wynn" (**J.A., p. 668**).

Additionally, the proof shows it to be more than mere exaggeration that Locklear could have gotten "forty kilos of cocaine and six to seven hundred pounds" from Fominaya in less

than 3 months, i.e., before March, 1986, when he says he terminated whatever relationship he had with Jonathan Lowry (id., 345-346 & 350).

Next, the testimony conclusively shows the very first transaction Brady Locklear could have possibly had with Pedro Fominaya (if indeed he had any) occurred in very late 1985 or 1986 (id., 489). This 1986 thesis is validated by Renice Locklear's testimony that she first met Pedro Fominaya in 1986 when the Jonathan Lowry and Brady Locklear couples vacationed in Florida (id., p. 609). She was equally positive that it was after that trip when she "went ... [with her husband] to Florida ... and her husband picked up some drugs" from Fominaya (ibid).

ARGUMENTS RELIED ON FOR ALLOWANCE OF WRIT

At the risk of belaboring the obvious, our hope is that this Court will indeed realize that the Opinion rendered by the Fourth Circuit on the unanimity issues (**Opinion, Appendix "C", p. A 9**) cannot be reconciled with Opinions rendered by the Ninth Circuit in **United States v. Jerome, 942 F.2d 1328, 1330-1331 (9th Cir. 1991)** and by the Third Circuit in **United States v. Echeverri, 854 F.2d 638 (3d Cir. 1988)**. Clearly this makes for the type of conflict that falls within the ambit of Rule 10.1(a), of the **Supreme Court Rules**.[3] As to the **Jerome** case,

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[3] Here we are aided by the Fourth Circuit's conclusion that its Opinion in this case is at least in conflict with the Third Circuit's Opinion in **United States v. Echeverri**. See Opinion, Appendix "C", at p. A 31.

the Fourth Circuit's ostrich-like response was to simply ignore their existence. For here, the Court despite having been advised of the first **Jerome** case nonetheless declared in its original Opinion that only the Third Circuit (in **United States v. Echeverri**) had adopted our unanimity thesis. Thus the Court chose to simply remit us to the almost impossible task of getting a review from this Court.

For starters the facts in our case are stronger than **Jerome**, which was decided on a plain error theory. Here, unlike the situation in **Jerome**, in addition to attacking the indictment for failing to enumerate the five or more people or the predicate acts relied on, our requested unanimity instructions were

rejected. Cf., **Jerome, 742 F.2d, at 1331.**

Also, it should be noted that the Appeals Court's inclusion of the alleged distribution to Carson Manor (as charged in Count III), as one of the acts required to make for the "series" (**Opinion, at p. A 33**) cannot be squared with **United States v. Townley, 942 F.2d 1324 (9th Cir. 1991).**

Again, our case is even stronger than **Townley**. For in **Townley** the Court held that inasmuch as the fingerprints on the wrapping there involved "showed only that Townley had some prior contact" with the wrapping did not justify the inference he was in possession of the contents. In our case, the inference being asserted is

that the prints not only proved Jonathan Lowry had possession, but that he actually distributed the contents to Carson Maynor in whose home the bag was found.

Next, it should be noted the Fourth Circuit was quite willing to concede Jonathan Lowry did not manage or supervise some of the people named by the government and the jury (**Opinion, Appendix "C", p. A 38**). And, seemingly the Court was quite willing to inferentially hold that "but for" the three (3) offenses it specifically isolated, they would have agreed there was a flaw as to the lack of a unanimity instruction on the "continuing series" element (**id., p. A 33 to A 34**). Even this is not all. It is at once apparent, as counsel

opposite will surely recognize, that one of the offenses isolated by the Court and asserted as proof the jurors were unanimous on at least three (3) felony drug offenses was not a "felony drug offense" (ibid). Indeed, it is beyond dispute that the Interstate Travel charge (made in Count IV) was an asserted violation of Title 18. And, Title 18 offenses simply do not fall within the ambit of 21 U.S.C., §848 (c)(1) & (2).

Additionally, the Fourth Circuit further held that "the jury also unanimously found [as one of the offenses required] that Jonathan Lowry committed another offense after November 1, 1987" (**Opinion, Appendix "C", p. A 33**). This non-specific reference was to a conversation

supposedly had with Pedro Fominaya and was related to drugs supposedly delivered to and paid for by Donald Lowry. Obviously the conclusion that this asserted transaction was one of the bases for the jury's verdict cannot survive the fact of the acquittals given in favor of Hardy Wynn and Donald Lowry. (**Ibid.**)

Also, the fact that one is credited with placing an order with a supplier, as the Court says was done here (ibid), is not standing alone a Title 21 offense. Surely counsel opposite will address this point.

I. *Due Process Was Denied When The Court Refused To Dismiss The Indictment Based On Its Failure To Identify The Five, Or More, Essential Persons The Grand Jury Relied On In Returning The CCE Indictment Against Jonathan Lowry.*

To qualify one for a CCE conviction a "series" of three (3) violations of the federal narcotics laws must have been committed; and these violations must have been performed "in concert" with at least five (5) other people. On the other hand, it is beyond dispute that the accused not only is entitled to be specifically charged with such violations by the grand jury, **Hamling v. United States, 418 U.S. 87, 117 (1974)**, but also to the unanimous concurrence of the jurors regarding

their selection of the "series" of crimes relied on.

These various contentions, which are an analogue to those summarily rejected in the Court's denial of our Motion to Dismiss, rely on the fact that it is indeed a firmly rooted constitutional principle that an accused is entitled to specific notice of the charges. See e.g., **Watson v. Jago, 588 F.2d 330 (6th Cir. 1977).**

Our point here is well made when one considers counsel opposite's response to our specific request for a description of the predicate offenses relied on. (See Counsel Opposite's letter, dated October 18, 1989. [**J.A., p. 41**] referred to in the **Opinion, Appendix "C", at pp. A 21 to A 22.**)

Now admittedly the alleged

distributions to David Mercer were charged in overt act nos. 4 and 5 of the conspiracy count. The distribution to Carson Maynor was alleged in the indictment as overt act no. 6. It was also referred to as Count III of the indictment.

By a parity of reasoning, the same points can be made with reference to the five (5) person requirement for a CCE conviction. And, while the Court disregarded our contention that the indictment did not properly charge a CCE violation because it failed to identify the five (5) persons the Grand Jury relied on in returning the indictment, the point can still be made that simply tracking the statute, as was done here, does not satisfy due process requirements.

This point is magnified by the fact that despite our specific references to Rule 7 (C) (1), Federal Rules of Criminal Procedure, it seems clear enough the Court, in denying our Motion (see Order, J.A., p. 51), arguably refused to reckon with the lack of any incorporation language in the CCE Count. As to this cogent point see **United States v. Apodaca, 843 F.2d 421, 427 and 428 (10th Cir. 1988)** and **United States v. Ricks, 776 F.2d 455, 463 and n. 13 (4th Cir. 1985)**. Also see **United States v. Staggs, 881 F.2d 1527, 1536-1546 (10th Cir. 1989)**. Cf. Opinion, Appendix "C", at pp. A 21 to A 22.

II. *Due Process Is Violated When A Court Refuses To Strike, Or Otherwise Protect The Accused From, Testimony That Was Willfully And Cleverly*

Volunteered By An Essential Government Witness That He Had Passed A Lie Detector Test.

The admissibility of the evidence showing Brady Locklear passed a lie detector test cannot be defended on any known theory. Indeed the Court, reversing the position expressed by him to the jury, has made the categorical determination that "Brady Locklear's testimony that he had passed a lie detector test was not in response to any question before the witness." Order, **J.A., p. 187 n.2.**

Since Locklear's testimony was definitely not peripheral to the issues in the trial, there is really no way it can be held that the resulting flaw had no effect on the jury's verdict. Yet, this error was said to be harmless. **Opinion,**

Appendix "C", pp. A 24 to A 25.

III. *Petitioner's Right Of Confrontation Was Violated By The Admission Of Certain Prejudicial Hearsay That Was Attributed By The Case-Agent To A Non-Testifying Informant-Declarant.*

The only evidence in this case offered to establish certain overt acts, that were specifically alleged to have been committed in furtherance of the charged conspiracy, was the testimony by Randy Myers, an SBI (State Bureau of Investigations) agent. He was allowed to testify that "two controlled buys were made [from James Maynor, an alleged conspirator] through a confidential informant" (**J.A., 1501-1503**). Additionally, this officer testified as to the substance of several phone calls this unknown

person supposedly had with Maynor (id., 1502). Further, the jury was assured that as a result of these transactions James Fuller Locklear and James Maynor were arrested and convicted (id., 1504-1505).

To begin with it could not be clearer that the agent's testimony that drug sales were consummated by his unnamed informant with Fuller Locklear and James Maynor is so obviously based on hearsay as to actually require any contrary argument to bear the label outlandish, ridiculous or specious. Yet, these asserted transactions were offered as substantive proof of the offenses said to be part of the series of felony drug transactions that made for the CCE accusation.

Since Maynor and Fuller Locklear were said (by the government [id., 1823]) to have been supervisees of Jonathan Lowry, there is simply no way to gauge the harm generated by this false proof.

IV. *Due Process Is Denied Where It Is Apparent From The Context In Which A Particular Question Was Asked And The Specific Objections Taken That The Intended Purpose Of The Question Was To Place The Accused's Character In Issue*.

Less there be some misunderstanding as to precisely what facts background the serious contentions here being made, the following segment of this Record cogently demonstrates the efficacy of our position:

> Q. Your brother had a reputation of being a

drug dealer, didn't he?

MR. WILLIS: Objection.

THE COURT: Overruled.

A. Repeat the question.

Q. Did your brother have a reputation for being a drug dealer?

A. I have heard it, yes.

MR. WILLIS: Objection.

THE COURT: Overruled.

Tr., pp. 1644-1645. (Emphasis supplied.)

Further, it is significant that the Government, in defense of its role in this debacle, has brazenly argued "the evidence concerning defendant's reputation was elicited from a co-defendant testifying on his own behalf to show the defendant's knowledge and participation in the conspiracy." Government's Response to

Defendant Lowry's Motion for a New Trial, **J.A., pp. 158-159.**

Here the District Court, without telling us how he did it, somehow hurdled, not only his original ruling made within earshot of the jury, but Rules 105 and 403, as well. This was done by ruling that this evidence was admissible "to show defendant Donald Lowry's knowledge and participation in the conspiracy" (Order, **J.A., at p. 186**). (Emphasis supplied.) Thus, we have the Government saying this evidence was intentionally offered, and was properly admitted against Donald Lowry and Jonathan Lowry because it showed Donald Lowry's "participation in the [charged] conspiracy." And, we have the Fourth Circuit saying it was within the trial

Court's discretion to admit this proof, doubtless for what it was worth (**Opinion, at pp. A 29 - A 30**).

So postured, it is significant here that no one bothered to tell the jury the evidence was so restricted.

V. *Due Process Was Denied When The Trial Court Refused To Instruct The Jury That They Were Required To Reach An Unanimous Agreement On The Three (3) Acts Constituting The "Continuing Series" Of "Felony Drug" Offenses Committed By The Defendant, In Order To Convict On The CCE Charge.*

To prove one guilty of violating 21 U.S.C. §848 (the CCE statute) the proof must establish, inter alia, a "continuing series" of violations of the federal narcotics law. Further, this activity must have been

undertaken in concert with five or more persons over whom the defendant acted as the organizer, supervisor or manager in the charged enterprise.

These tenets make for the requirement that the jury must unanimously agree on the three predicate acts relied on to satisfy this numerical requirement. See **United States v. Echeverri, 854 F.2d 638 (3d Cir 1988)**. This follows because the unanimity required by the Sixth Amendment's right to a jury trial and **Rule 31, Federal Rules of Criminal Procedure**, makes it clear enough that unanimity certainly means far more "than a conclusory agreement that the defendant has violated the statute in question" and that there is a meaningful "requirement of substantial

agreement as to the [principle] factual elements underlying a specific offense." United States v. Ferris, 719 F.2d 1405, 1407 (9th Cir. 1989). United States v. North, 910 F.2d 843, 873-878 (D.C. Cir. 1990).

Postured by the above analysis, the question then is, what is it about the verdict that shows what acts were indeed relied on by the jury and that they were unanimous on these selections?

VI. *Where The Jury Is Submitted More Than The Required Felony Drug Offenses Needed To Satisfy The "Continuing Series" Element Of The "CCE" Offense, The Evidence Must Be Sufficient To Prove All Of Them. And Where (As Here) It Cannot Be Reliably Determined Which Offenses The Jury May Have Relied On In Reaching Its Verdict, It Cannot*

Be Said That Due Process Was Accorded The Accused.

In a nutshell, we are contending that due process is violated, where as here, the verdict, finding our Petitioner guilty of CCE, fails to indicate the specific federal drug violations relied on by the jury to satisfy the "continuing series" element required by 848(c)(2). The same is true when there is no way to know if there was the required unanimity on any three of the violations.

Now, a critical aspect of the specific contentions here being made involves crediting the insuperable fact that the proof in the Record is clearly insufficient to support any finding that Jonathan Lowry was guilty

of all of the substantive Felony Drug Offenses listed in the indictment -- some of which were designated as "overt acts" in the conspiracy charge. And, only Count III charged the defendant with a substantive violation of Title 21, U.S.C. (The apparent notions of the Fourth Circuit to the contrary, notwithstanding, the charge made in Count IV of this indictment is a violation of the Interstate Travel Act 18 U.S.C. § 1952. Clearly this is not a felony drug offense within the limiting language of 21 U.S.C. §848 [c][1]).

The effect of this is most obvious. Simply put, there is no way one can be sure which of the possible predicate "felony drug offenses" the jury unanimously agreed the defendant

committed. Nor can there be any assumption that none of the jurors did not rely on a short list (for them) that included one or more of the charges made in the various "overt acts", i.e., Nos. (6) (7) (8) (10) (12) (13) (14) (15) & (18), for which the evidence was clearly insufficient to support findings of guilt beyond a reasonable doubt as argued at the close of all the evidence (**Tr. 1502**). And, how can it be known whether any of the jurors did not rely on Count III, although the proof that offense was committed can hardly pass constitutional muster. See **United States v. Townley**, **supra**. Also see Justice White's dissent from the denial of Certiorari in **McCollock v. United States**, 108 S. Ct. 337 (1987).

VII. *A Verdict Finding One Guilty Of CCE That Cannot Be Squared With The Constitutional And Statutory Requirement That The Jurors Must Unanimously Agree, Both, As To The Five (5) Or More Persons, And As To Acts Making For The "Continuing Series" Of Felony Drug Violations Required Must Be Deemed Invalid.*

By the pretrial Motion the defense had sought to eliminate any possibility that a composite or "patchwork", non-unanimous verdict would result. The Motion also warned the Court of the very real danger that persons not considered by the Grand Jury could possibly be relied on by the petit jury as one or more of those supervised and controlled by the asserted "kingpin". These same points were magnified, not only in counsel's

Rule 29 Motion made at the close of the Government's case (**Tr., pp. 1494-1506**), but in counsel's submitted instructions. These same points are likewise applicable to the asserted drug violations the defendant had to have committed "in concert" with these five (5) or more people in order to violate (if he did) 21 U.S.C. §848.

Here, it is significant that Justice Blackburn, in his concurring opinion, in **McKoy v. North Carolina, 494 U.S 433 (1990)**, underscored that "[i]n federal criminal prosecutions, where a unanimous verdict is required, the Courts of Appeals are in general agreement that 'unanimity'... means more than a conclusory agreement that the defendant violated the statute in question...." Id., 449 n.5. This

cogent analysis when applied to the jury's list[4] of the people it found were "involved" (when it is obvious some of those denominated could not properly have been qualified for inclusion in the numerical requirement) really compels this same conclusion. Cf., **United States v. Echeverry, 719 F.2d 974, 975 (9th Cir. 1983).** Also see **United States v. Beros, 833 F.2d 455, 461 (3d Cir. 1987).**

To be sure, we view the jurors use of the word "involved" as actually masking an apparent inability

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[4] The list being referred to simply read "people involved in the CCE with Jonathan Lowry [were] Ernest Harris; Kelly Ray Chavis, Charles Smith, David Mercer; Brady Locklear; Pedro Fominaya; James Bonk Maynor, Carson Maynor; Bonita Jones Lowry; Renice Locklear." (J.A., p. 1968). (Emphasis supplied.)

to forthrightly state that the jurors were indeed unanimous on at least five (5) of the ten (10) persons denominated by them as having simply been "involved" -- whatever that means. Also, it cannot be overlooked that the word "involved" certainly would include one who was merely a "purchaser" of Drugs. In fact the inclusion of Kelly Chavis as one of those "involved" really makes this point. For the government outrightly concedes he was not supervised (**J.A., p. 1716**). And, even the Court of Appeals inferentially credits our argument as to some of those listed not having been supervised was indeed valid. **Opinion, Appendix "C", p. A 38.**

Our point here is well made when

one realizes that most of the names on the jury's unsolicited list (of the persons said to have been "involved") were not mentioned in either the indictment or even considered by the Grand Jury.

Granted, the District Court has indicated this list was given "in accordance with the Court's instructions" (Order, **J.A., p. 183**). However, the grim fact is there was nothing in the Court's charge that solicited the preparation of any such list. The jurors were only told to "identify" those who participated in the required series of violations "to [them]selves" (**J.A., p. 1934**).

VIII. *Where No Reasonable Juror, After Viewing The Evidence In The Light Most Favorable To The Prosecution, Could Have Found The Proof*

Established That The Petitioner, Either, (A) Committed The Required "Continuing Series" Of Felony Drug Violations, And (B) Did So "In Concert" With Five Other People As Mandated By Title 21 U.S.C., §848, The Verdict Finding The Accused Guilty Of CCE Is Constitutionally Defective.

In dealing specifically with some of the various persons the government has contended were managed or controlled by Jonathan Lowry, one point that must be reckoned with is the fact that merely selling an individual drugs is not sufficient to establish the management role. Given this superable tenet, it seems clear enough that even assuming the jurors credited the testimony of Mercer, Harris, Chavis and Smith; at best, their testimony only showed them to be

purchasers of drugs and not employees or supervisees of Jonathan Lowry.

Also, while the Government contended that Fuller Locklear ("overt act" No. 14), Hanson Hunt (overt act 15) and John Hunt (overt acts 12 & 13) were other than mere purchasers there is absolutely nothing in this Record that connects them to Jonathan Lowry in any respect.

The Record here also fails to establish that Jonathan Lowry "supervised" in any manner, Charles Smith, Renice Locklear, David Mercer, Carson Maynor, Bonita Lowry, Pedro Fominaya, James "Bonk" Maynor, Ernest Ray Harris, Kelly Chavis or Brady Locklear. See **United States v. Douglass, 818 F.2d 1317 (7th Cir. 1987).**

The upshot of the above specific list is that it exposes several serious additional flaws in Jonathan Lowry's conviction. Here, it is clear enough that any relationship between our petitioner and the asserted distributions to John Hunt, David Mercer, James Fuller Locklear, and Ernest Ray Harris could only be that of a seller and a buyer. The same is true of Kelly Chavis and Charles Smith. Further, there was no evidence whatsoever connecting this petitioner in any way to Hanson Hunt. And, Julius Lowry was not shown to have been involved in anything but the purchase of some land, which excludes him as one of those allegedly supervised.

It can hardly be denied that

Jonathan Lowry's print on two bags found locked in a box that contained a bag, or bags, of contraband and non-contraband substances is not proof the bags containing the contraband were distributed by Lowry to Carson as charged in Count III. See **United States v. Townley, 942 F.2d 1324 (9th Cir. 1991).**

So postured, it is illogical to a fault for the Fourth Circuit to have regarded the asserted distribution to Carson Maynor (Count III) as one of the required predicate offenses for the CCE conviction (**Opinion, Appendix "C", p. A 33**). The same fault exists with reference to their determination that this proof also showed a conspiratorial relationship between Jonathan Lowry and Carson Maynor and

as proof Carson Maynor was organized (not supervised) by Lowry. **Id., p. A 38.** See **United States v. Sperling, 560 F.2d 1050, 1055 (2d Cir.1977).**

A further aspect of this analysis focuses on the fact that (1) Renice Locklear, (2) Kelly Chavis, (3) Bonita Lowry, (4) Brady Locklear, (5) Pedro (6) Ernest Fominaya and (7) Charles Smith were, for the first time, contended to have been supervised by Jonathan Lowry during counsel opposite's summations (**J.A., pp. 1823-24**). While Chavis, Bonita Lowry, Brady Locklear and Fominaya were said in the indictment to have been conspirators, they were not denominated by the government in its October 18, 1989 list of persons who it was contending were indeed

supervised by Jonathan Lowry (J.A., p. 41). See United States v. Chavez, 845 F.2d 219, 220-222 (9th Cir. 1988).

In short, one cannot rule out the possibility that Jonathan Lowry was convicted on the basis of less than the unanimous concurrence of all the jurors as to the same five (5) or more persons. Nor, can the possibility be excluded that the jurors convicted Jonathan Lowry because they believed involvement was the critical test. And, just as surely there is no way it can be said that the jurors meant by their use of the word involved the concept of organized the Court of Appeals would impute to them (Opinion, at p. A 38). See Shepard v. United States, 290 U.S. 96, 102-103 (1933), United States v. Hannah, 584 F.2d 27,

32 (3d Cir. 1978) and United States v. Check, 582 F.2d 668, 681 (2d Cir. 1978).

IX. *To The Extent The Guidelines Were Applicable, The Court Erred In Calculating Due Process Requires That The Proper Sentencing Range Must Be Determined In Accordance With Fundamental Criteria.*

The verdicts finding Jonathan Lowry guilty of conspiracy and "CCE" must be considered in the light of the outright acquittals of Donald Lowry, Hardy Wynn and Bonita Lowry and the specific determinations made by the jury that Carson Maynor and Bonita Lowry were not members of any conspiracy that existed after November 1, 1987.

A critical aspect of the

contentions here being made credits the fact that the District Court was not bound by the jury's verdict as to, either, the quantity of contraband indicated in the indictment, or the dates referred to therein as the terminal points of the charged conspiracy (21 U.S.C., §846) and/or the CCE (21 U.S.C., §848). See **United States v. Moreno, 889 F.2d 465 (6th Cir. 1990)** and **United States v. Gibbs, 813 F.2d 596 (3d. Cir. 1987).**

(a) ***Given the jury's rejection of the testimony of Pedro Fominaya with reference to his accusations against Donald Lowry, Hardy Wynn and Bonita Lowry, which rejections can only be viewed as representing a jury determination that certain specific events he testified to did not occur, the collateral estoppel component of the double jeopardy clause bars the Court from relying on the reverse of such rejection in placing this petitioner under the Guidelines in sentencing him.***

In this case, it must be conceded the verdict finding Donald Lowry,

Hardy Wynn and Bonita Lowry not guilty can only be viewed as being a rejection of a crucial segment of the prosecution's theories upon which the Government relied solely on the testimony of Pedro Fominaya. Simply put, those theories were that Donald Lowry and Hardy Wynn were involved in numerous narcotic transactions with Pedro Fominaya. And, that during the course of these particular transactions he (Pedro Fominaya) distributed to them for Jonathan Lowry literally hundreds of kilos of cocaine. See, **J.A., pp. 649, 653-654, 662, 685, 691, 698-700, 718-721, 873, 875-882.**

Equally apparent is the fact that the jury likewise rejected Fominaya's testimony in which he claimed to have

talked with Bonita Lowry (as charged in Count VI). This follows because: if the jury had believed Pedro Fominaya's version of the conversation, not only would they have convicted Bonita Lowry on Count VI, Donald Lowry and Hardy Wynn would have been convicted of conspiracy -- the only charge made against them.

The above scenario thus provides formidable support for our contention that the Government and the trial court were estopped, by the verdicts in this case, from contending and finding that the charged conspiracy and the CCE, if indeed they ever existed, extended past November 1, 1987. Further, it seems clear the Court was likewise collaterally estopped from accepting Pedro

Fominaya's testimony as the sole predicate for the finding that our petitioner was indeed properly held accountable for the more than 150 kilos of cocaine Fominaya says he supplied Jonathan Lowry through Donald Lowry and Hardy Wynn (both of whom were acquitted).

Clearly then, the trial Court's acceptance of Pedro Fominaya's testimony, both, to extend the CCE and the conspiracy beyond November 1, 1987, and in calibrating the quantities involved, with reference to the Guidelines, is logically and legally inconsistent with the verdicts finding Hardy Wynn, Donald Lowry and Bonita Lowry not guilty. And, it is inconsistent with the finding that Bonita Lowry and Carson Maynor were

not involved in any conspiracy that existed after November 1, 1987. (J.A., p. 1967.) This rationale should also be applied full strength to the asserted January, 1988 transaction (id., 717-721), which was the only event relied on to qualify Jonathan Lowry for the Guidelines.

(b) ***Assuming the defendant did engage in a Continuing Criminal Enterprise, still the evidence was insufficient to show this enterprise existed after November 1, 1987.***

Here we start with the contention that the significance of the terminal date of the CCE in this case is not limited to whether the Guidelines even apply. The date is significant for the further reason that there are ex post facto (Article 1, §9 United States Constitution) ramifications here involved.

Here it is a given that Jonathan Lowry could only be sentenced under the Guidelines if indeed the charged CCE was in existence after November 1, 1987 and he was its "Kingpin". On this point, the fact remains none of the acts mentioned anywhere in the indictment that could possibly be relied on to provide one of the required acts to make for the continuing "series," was shown to have occurred after November 1, 1987. See **United States v. Head,**[5] **641 F.2d 174 (4th Cir. 1931).**

Given then the acquittals rendered in favor of Donald Lowry and

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[5] In Head, the Fourth Circuit actually ruled that "in order to avoid the five year statute of limitations for conspiracy, [the government] must prove an overt act in furtherance of the conspiracy committed within the limitation period." Id., 177.

Hardy Wynn, the jury's exclusion of Bonita Lowry and Carson Maynor and the lack of proof as to anyone else who could have possibly "conspired" with Lowry (after November 1, 1987), the trial Court could not simply assume an inconsistent verdict and regard the situation to be controlled by **United States v. Powell, 469 U.S. 67 (1984).** See **United States v. Valasquez, 885 F.2d 1076, 1090-1091 and n. 13 (3d Cir. 1989).**

Thus, the verdict finding Jonathan Lowry was a conspirator after November 1, 1987 can only be explained on the theory that Jonathan Lowry's asserted conversation with Pedro Fominaya was treated by the jury as satisfying the agreement element of a new conspiracy, one that was different

from the one charged in this indictment. At most any such conversation, between Jonathan Lowry and Pedro Fominaya, could only translate into a showing that Jonathan Lowry was trying to be a customer in a drug transaction, not Fominaya's partner in crime. See **United States v. Jerome, 942 F.2d 1328 (9th Cir. 1991).**

So postured, it is worth suggesting that the points contended for above are truly well made by the fact that the acquittals referred to above "represent a jury determination" [6] that Pedro Fominaya did not deliver to Donald Lowry and Hardy Wynn any drugs whatsoever. Thus, the absence of any

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[6] See, Dowling v. United States, 110 S. Ct. 668 (1990).

other possible basis for their verdict requires the conclusion that the trial court was foreclosed from accepting his testimony as the sole basis for the foisting of the Guidelines on Jonathan Lowry or in fixing the quantity of drugs involved.

(c) ***The Court's Utilization Of The Guidelines In Sentencing This Defendant Clearly Violated Due Process Since The Proof Failed To Establish That Any Significant Segment Of The Charged Offenses (i.e., Any "Overt Act" In Furtherance Of Charged Conspiracy, Or Any Of The Predicate Offenses Required For A CCE Conviction) Occurred After November 1, 1987.***

The defendant disputed the "Presentence Report's" characterization of the offense for which he was convicted, as having occurred between January 1, 1981 "through January, 1990" and, as being an offense that involved "275 kilograms of cocaine and 7,500 pounds of marijuana." One of

the bases for the dispute was the lack of proof showing transactions, possessions, distributions (and the like) of contraband by anyone occurred after November 1, 1987. See Guideline §2D1.4, Comment (N.1) and **United States v. North, 900 F.2d 131, 133 (8th Cir. 1990).**

(d) ***Assuming the Guidelines properly applied to the sentence imposed on this petitioner, the ending dates indicated in the Indictment for the CCE and the conspiracy counts are not dispositive as to which version of the Guideline applied.***

The plot here becomes even more complicated when it is realized that even if the Guidelines did apply to Jonathan Lowry's conspiracy and CCE convictions, we cannot rely on the dates in the indictment as being dispositive of all of the issues as to the applicable version of the Guidelines that control.

Here, we are aided in the determination as to which of the various versions of Guideline 2D1.1 applies by a very specific statement in the Application Notes to §2D1.5. There the commission, albeit in another context, indicated that the date "the last overt act" was committed in furtherance of a CCE is most significant in the application of the Guidelines. See U.S.C., §2D1.5, Application Note No. 3, p. 80. This being so, the decision as to whether the Guidelines even apply, and (if so) which version is applicable, would depend on the date when the last "overt act" was committed.

In all this, it seems clearly to be the law that the quality of the evidence relied on must have a

"sufficient indicia of reliability to support its probable accuracy," Guideline, §6A1.3 (A). Equally important is the further fact that the fixing of the date of the last "overt act" is likewise crucial and essential to any resulting query as to whether the Court's finding, in this regard, violated the ex post facto concept of the Constitution (Article 1, §9, Cl. 3). Such a violation would result if the Court applied a Guideline as amended after the last date of the "overt act" committed in furtherance of the charged offense. In our judgment, the last "overt act" would be the last offense committed in the required "Continuing Series".

In assaying the determinations apparently made by the trial Judge,

there are certain facts that must be reckoned with. One, there was no evidence, direct or circumstantial, that established the commission (after November 1, 1987) of any act that could possibly be regarded as satisfying the "Continuing Series" requirement. Now it may very well be argued that Pedro Fominaya did testify that (as charged in the indictment) Jonathan Lowry propositioned him to get with his brother (i.e., Jonathan Lowry's brother) and consummate a drug transaction. Despite his testimony that such a transaction was consummated, Donald Lowry was acquitted. The fact of the acquittal must be regarded as a categorical rejection of Fominaya's testimony on this point. Now we do concede the

Commission, in making the lot of defense lawyers as difficult as possible, has made any information "with sufficient indicia of reliability to support its probable accuracy" appropriate for consideration in making such factual determinations as were made here. See Commentary to Guideline, §6A1.3, which talks about "an acceptable evidentiary basis" for the findings required of the sentencing Judge. Cf., **United States v. Johnson, 823 F.2d 842 (5th Cir. 1987).** Next, the trial Court's findings were said to have been based on the testimony in the Record.

So postured, the issue here quickens and is easily resolved on the basis of the presence in, or absence from, the Record of a sufficient

evidentiary basis for the various factual findings being challenged herein.

We also concede it has been held that the burden is on one who would object to the application of the conspiracy Guidelines to show they withdrew from the conspiracy before November 1, 1987. See **United States v. Watford, 894 F.2d 665 (4th Cir. 1990)**. But Watford, can hardly be dispositive of the issue as postured here (1) by facts showing the jury's elimination of all of those who could possibly be regarded as having been members of any conspiracy with this petitioner after November 1, 1987. And, (2) by other facts which make it impossible that any identifiable person could rationally be held to

have been in a conspiracy with Jonathan Lowry after that date.

(e) ***The evidence failed to prove any attempt to obstruct justice, hence the two-point increase in the offense level was not justified.***

In his Report, the probation officer made reference to asserted threats made against Brady Locklear. Obviously, if threats were made, they occurred prior to any indictment in this case and after the government's cultivation of Locklear's testimony. Yet, there is no allegation concerning this asserted conduct in the indictment. Also, we only have Locklear's word that it happened. Further, it has never been held that a guilty verdict gospelizes everything a witness says.

(f) ***Given the fact that Jonathan Lowry's prior State felony drug offense was charged as having been***

committed "as part of the instant offense," the Court erred when it included this prior offense in calculating his criminal history score.

The facts here are specifically controlled by Guideline §4A1.2(a) (1), which expressly provides that a Court is only allowed, in calculating a defendant's criminal history score, to include "sentences previously imposed upon an adjudication of guilt, ..., for conduct not part of the instant offense."

(g) ***A sentence of life without parole under the facts here violates due process; hence was, and is, illegal.***

A sentence of life without parole is the sentence presented by Congress for the most severest of the drug offenses. Indeed the statute being referred to, i.e., 21 U.S.C., §848 (b) (2) (B), regarded as the "Super

Kingpin" statute provided a mandatory life sentence for the principle administrators, organizers, or leaders of narcotic enterprises that gross ten million dollars in a twelve (12) month period. If such is the penalty for these super kingpins, then giving Jonathan Lowry a "natural life" without parole sentence in these circumstances seems unduly severe.

We are aided in this position by the compelling decision of **United States v. Gomez**, 407 F. Supp. 407 (E.D. Mich. 1989).

CONCLUSION

In **Shepard v. United States**, the point was well made by Justice Cardoza, speaking for an unanimous Court, (in **United States v. Shepard**, 290 U.S. 96 [1933]) that a "trial

becomes unfair if facts developed at trial are used by an appellate Court [as they were by the appeals Court below] for different purposes, purposes that were unavowed and unsuspected" at the trial level. Id., 102-103). So in this case, the Government contended Jonathan Lowry had supervised certain individuals and for that reason they could be counted in meeting a numeral qualification. And, while no mention was made by the Government that our petitioner had organized anyone, the Court of Appeals without any input from either party, proceeded to sandbag this petitioner by inserting this new and different concept into the mix. Clearly this is wrong.

Surely then, if for no other

reason than to vindicate the notion that "an appellate court may only properly review a criminal case only on the theory submitted to the jury at trial by the prosecution,"[7] this cause should be reviewed.

This follows because, given the obviously irreconcilable conflict between the positions taken by the Third and Ninth Circuits in the Echeverri and Jerome cases and the resolution made by the Fourth Circuit in this case, this conflict alone supplies a sufficient reason to review this cause. And, when the other cogent reasons argued above are added, clearly this cause is one that ought to be reviewed and reversed.

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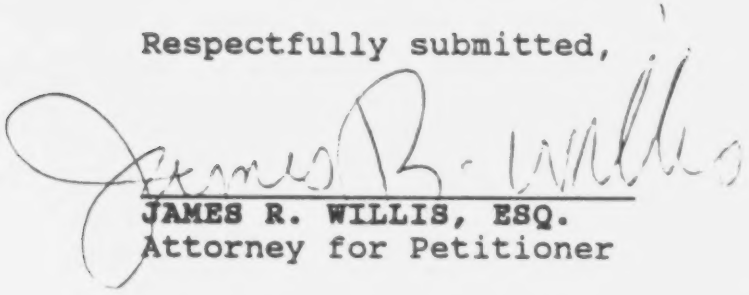
[7] United States v. Hannah, 584 F.2d 27, 32 (3d. Cir. 1978).

Also, this Court should face head on the apparent belief by the Fourth Circuit that a violation of the Interstate Travel Act (ITAR) can be viewed as a felony drug offense when such a determination is required to justify a CCE conviction.

Another critical point here, one we consider worthy of being weighted in our favor, is the fact that in our Petition For Rehearing (**Appendix "B"**) the most critical issues here were called to the Fourth Circuit's attention and they simply ignored what cannot be viewed as routine problems with the panel's decision.

For all of the reasons argued herein, this cause should be reviewed to the end that it can be reversed.

Respectfully submitted,



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